Supreme Court, U.S.
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No. ——OFFICE——

In The

Supreme Court of the United States

LUC MARTINI,

Petitioner,

v.

THE BOEING COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an employer violates the Americans With Disabilities Act when it refuses to consider a disabled applicant for employment who is seeking a trial work period under social security regulations?

Whether the court of appeals violated principles of comity by refusing to certify to the Washington State Supreme Court this issue under state law, especially in light of that court's express departure from federal precedent in analyzing state law disability discrimination claims?

PARTIES TO THE PROCEEDINGS

Petitioner is Mr. Luc Martini, who was plaintiff in the district court and appellant in the court of appeals. Respondent is The Boeing Company, which was defendant in the district court and appellee in the court of appeals.

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The opinion of the court of appeals (App., *infra*, 1a) appears as the unpublished case of *Martini v. Boeing*, No. 98-35642, 2000 U.S. App. LEXIS 23902 (9th Cir. Sept. 21, 2000). The opinions of the district court (App., *infra*) are unreported.

JURISDICTION

The court of appeals entered judgment on September 21, 2000. A judgment denying a petition for rehearing and suggestion for rehearing en banc was entered on October 31, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The issues raised in this petition pertain to the interaction between the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101, and the provisions of the Social Security Act (SSA) and its implementing regulations providing for trial work periods. 42 U.S.C. § 422(c), 42 U.S.C. § 423, and 20 C.F.R. § 404.1592 (1998).

STATEMENT

A. Mr. Martini's Employment With Boeing

The Boeing Company hired Mr. Martini as an engineer in 1978. He later worked for Boeing as a training

instructor. In that capacity, he developed curricula, methods, and procedures for Boeing customers using AWACS military aircraft. He also taught classes and provided training for these customers. During his employment with Boeing, Mr. Martini developed depression and sleep apnea.

Mr. Martini ended his employment with Boeing on August 21, 1990. After leaving Boeing, Mr. Martini tried to find work. He was unsuccessful.

In 1991, Mr. Martini applied for social security disability benefits. Mr. Martini's application was initially denied, but he was ultimately granted disability benefits on July 6, 1991, retroactive to his last day of work at Boeing.

In 1995, Mr. Martini obtained a judgment against Boeing for disability discrimination under state law, which was appealed by Boeing and not resolved until 1999.

In February 1996, while still receiving social security disability benefits, Mr. Martini sought employment with Boeing on a trial work basis. Mr. Martini responded to an advertisement in "Aviation Week & Space Technology" for an Instructional Course Designer (F-22 AWACS). In his application, Mr. Martini indicated an interest in four open positions, and noted that his "background in the Instructional Systems/Support (CBT) area is without equal. . . . [He] personally developed the only existing AWACS Radar Computer Based Training (CBT) data base in existence. . . . " Three months after he sent his letter of application, he called the Boeing Employment Hotline

and discovered that the same job was still being advertised. After receiving no response to his job applications, Mr. Martini filed a disability discrimination claim with the EEOC on April 18, 1996.

Prior to applying for the Boeing jobs in 1996, Mr. Martini consistently represented that he could work with accommodation. He made such representations in 1991 in his application for SSDI (Social Security Disability Insurance) benefits. Additionally, doctors hired by Boeing in connection with a worker's compensation claim who examined him in 1995 made findings that he could work. Before and after the February 1996 job applications were made, Dr. Robert Miller, Mr. Martini's treating psychologist, made annual representations to Boeing's insurance administrator that Mr. Martini was a viable candidate for job retraining. In October 1995, Dr. Miller also opined that Mr. Martini was capable of gainful employment with an employer who was willing to exercise a degree of flexibility with him owing to his illness. In a declaration submitted to the trial court, Dr. Miller reiterated this opinion. App., *infra*, 59a-62a.

Six months *after* his Boeing application for employment was submitted and four months after his EEOC complaint was filed, in connection with a separate worker's compensation hearing involving Boeing, Mr. Martini testified for the first time that a shoulder injury he received during his employment affected his depression and pushed him over the edge from being employed successfully to being totally disabled.

Boeing never considered Mr. Martini for employment expressly because Mr. Martini was receiving social

security disability benefits. In an attorney letter to the EEOC that came months after Boeing's failure to hire Mr. Martini, Boeing claimed there was no duty to consider Mr. Martini for employment owing to his receipt of social security disability benefits. Boeing claimed its position was supported by Mr. Martini's statement of total disability made during his testimony in August 1996, months after Boeing's discriminatory failure to hire him in February 1996.[1] App., *infra*, 63a, 71a.

B. Proceedings Below

This matter was originally filed pro se in King County Superior Court in Washington State on March 18, 1997, and was removed to the United States District Court for the Western District of Washington and assigned to Judge William L. Dwyer. In his complaint, Pro Se Plaintiff Martini alleged violations of Title VII (42 U.S.C. § 2000e), the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101), WASH. REV. CODE

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[1] Owing to pretrial orders limiting discovery in this litigation, the record is incomplete as to detailed facts regarding the essential elements of the jobs applied for, and as to the comparative qualifications of others hired for the jobs. In July 1997, Magistrate Judge Weinberg stayed all discovery by Mr. Martini and limited Boeing to discovery pertaining to "the existence and extent of plaintiff's disability at the time of, and *after*, his 1996 employment application at Boeing. . . . " (emphasis added) App., *infra*, 7a, 8a. In an October 1997 order, Magistrate Judge Weinberg also denied Mr. Martini's efforts to obtain discovery pertaining to qualifications of persons hired to those jobs and information on Boeing's procedures for ADA compliance. App., *infra*, 11a. These omissions will not prevent a meaningful review of the case on appeal.

§ 49.60, retaliation, age discrimination, and other claims associated with Boeing's failure to consider him for vacant positions in February 1996.

On May 1, 1997, by order, Judge Dwyer referred all pretrial matters to Magistrate Judge John L. Weinberg.

On June 11, 1997, Magistrate Judge Weinberg stayed discovery pending the filing and determination of Boeing's motion for summary judgment. App., *infra*, 6a.

On July 17, 1997, Magistrate Judge Weinberg continued the stay of discovery, but permitted Boeing to conduct discovery limited to the issue of the existence and extent of plaintiff's disability at the time of, and after, his 1996 employment application, including plaintiff's representations and any determinations as to that disability. Magistrate Judge Weinberg further ordered that discovery by Pro Se Plaintiff Martini would remain stayed, "[b]ut if plaintiff demonstrates that, to defend the summary judgment motion, he needs to do discovery on the issue described above, he may apply for leave to do so." App., *infra*, 8a-9a.

On August 11, 1997, Boeing filed a motion for summary judgment claiming that the case should be dismissed under *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996), because Pro Se Plaintiff Martini was not qualified to work owing to his receipt of social security disability benefits at the time of his job application.

On October 27, 1997, Magistrate Judge Weinberg denied Pro Se Plaintiff Martini's request to obtain discovery pertaining to the qualifications of persons hired into

the jobs to which he had applied and information regarding Boeing's procedures for ADA compliance. App., *infra*, 11a.

On November 12, 1997, Mr. Martini obtained counsel.

On April 21, 1998, Magistrate Judge Weinberg issued a recommendation that this case be dismissed pursuant to *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996). App., *infra*, 23a.

On May 4, 1998, Magistrate Judge Weinberg issued a supplemental recommendation that this case be dismissed pursuant to *Johnson v. State of Oregon*, 141 F.3d 1361 (9th Cir. 1998). App., *infra*, 30a.

On May 6, 1998, Mr. Martini filed numbered objections to the recommendations. Objection Number One asserted that Magistrate Judge Weinberg erred by failing to consider the Social Security Administration's trial work period in his recommendation.

On June 3, 1998, Judge Dwyer granted Defendant's motion for summary judgment and entered judgment in favor of Boeing. App., *infra*, 32a.

On July 2, 1998, Mr. Martini filed a timely notice of appeal.

On or about December 1, 1998, Mr. Martini filed an opening brief which argued that the laudable goals of the trial work period, which is designed to permit a disabled person to test their ability to work, would be subverted if companies like Boeing were permitted to place barriers of presumptive disability between disabled persons and vacant positions.

On September 21, 2000, the court of appeals affirmed the judgment of the trial court without mentioning the impact of the trial work period on their analysis. App., *infra*, 1a.

On October 31, 2000, the court of appeals denied Mr. Martini's petition for rehearing and suggestion for rehearing en banc. App., *infra*, 35a.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I. The Court Should Grant Certiorari Because This Is An Important Issue Involving Interpretation Of Federal Statutes

A. A Central Purpose Of The ADA And The Social Security Act Is To Put Disabled Persons Back To Work

1. To Encourage Persons On Social Security Disability To Go Back To Work, The SSA Provides For A Trial Work Period Whereby Persons Who Are Totally Disabled Can Test Whether They Can Return To Work

Congress has declared it a policy that persons receiving social security disability benefits find and maintain employment, both to assist individuals with disabilities and to promote savings to the Social Security Trust Fund; to further this end, Congress provides incentives including a trial work period of up to nine months in which they may work without affecting their disability status. 422 U.S.C. § 422(c); 422 U.S.C. § 422(a) (repealed 1999); Ticket to Work and Work Incentives Improvement Act of

1999, 42 U.S.C. § 1320b-19. Regulations have been promulgated to explain this provision. In the regulations, a trial work period is defined as follows:

> The trial work period is a period during which you may test your ability to work and still be considered disabled. It begins and ends as described in paragraph (e) of this section. During this period, you may perform services (see paragraph (b) of this section) in as many as 9 months, but these months do not have to be consecutive. We will not consider those services as showing that your disability has ended until you have performed services in at least 9 months.

20 C.F.R. § 404.1592.

In February 1996, Mr. Martini attempted to utilize these provisions by applying for several jobs at Boeing for the purpose of testing whether he could become employable.

2. To Encourage Disabled Persons To Keep Working, The ADA Requires Accommodation

Congress has found that some "43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older." 42 U.S.C. § 12101(a)(1). "[S]ociety has tended to isolate and segregate individuals with disabilities," and Congress recognizes that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). "[T]he Nation's proper goals regarding

individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(8). Moreover, failure to do so "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. § 12101(a)(9).

Congress has declared that the purpose of the Americans with Disabilities Act is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). To achieve that goal and to reduce the cost of the dependency and nonproductivity of disability discrimination, the ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures [and] hiring. . . . " 42 U.S.C. § 12112(a).

The ADA defines discrimination to include:

> Limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee (42 U.S.C. § 12112(b)(1));
>
> Utilizing standards, criteria, or methods of administration (A) that have the effect of discrimination on the basis of disability; or (B) that perpetuate the discrimination of others who are subject to common administrative control (42 U.S.C. § 12112(b)(3));

> Not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant (42 U.S.C. § 12112(b)(5)(A));
>
> Denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant (42 U.S.C. § 12112(b)(5)(B));
>
> Using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity (42 U.S.C. § 12112(b)(6)).

Boeing's failure to consider Mr. Martini's job application because he was receiving SSDI payments, without regard to whether he could do the job, falls within each of the statutory definitions of disability discrimination listed above. The question for this Court is whether the Congressional goals of keeping disabled persons at work and removing disabled persons from the social security rolls can be achieved if employers are permitted to avoid the application of the ADA simply by utilizing knowledge that an applicant is receiving SSDI as a defense, without further inquiry as to whether the applicant can in fact perform the essential functions of the job. *See* 42 U.S.C. § 12111(8).

Of additional concern is that Boeing's use of its knowledge that Mr. Martini was receiving SSDI, and therefore was an individual with a disability, as its basis for failing to consider him for employment, seems to be the exact conduct Congress intended to prohibit by disallowing pre-employment medical examinations that are designed to determine whether an applicant "is an individual with a disability or . . . the nature or severity of such disability." 42 U.S.C. § 12112(d)(2)(A). In contrast, Congress does permit an employer to "make preemployment inquiries into the ability of an applicant to perform job-related functions." 42 U.S.C. § 12112(d)(2)(B). In effect, Boeing's use of its knowledge that Mr. Martini was receiving SSDI benefits to screen him out as a candidate for employment equates with the prohibited preemployment medical examination that screens out persons simply because of their disabilities, while Boeing failed to conduct the proper parallel inquiry into whether Mr. Martini could perform job-related functions.

Boeing has thus far escaped liability for its actions by hiding behind legal precedent pertaining to the effect of prior conflicting representations of an employee's ability to work made in social security applications by current employees during periods of illness or injury. *See Cleveland v. Policy Management*, 526 U.S. 795 (1999); *Johnson v. State of Oregon*, 141 F.3d 1361 (9th Cir. 1998); *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996). However, the reasoning supporting those decisions is irrelevant to the facts set forth here.

This Court has an opportunity in reviewing this case to determine whether employers such as Boeing are circumventing the intent of Congress by misconstruing

Supreme Court precedent, which does not address the relationship between the related purposes of the ADA and the SSA to return disabled persons to work. Given that the SSA itself allows disability insurance recipients to attempt to work without loss of benefits, allowing employers to presume total disability for ADA purposes during receipt of SSDI benefits is inconsistent with the Congressional intent of both Acts.

B. *Cleveland v. Policy Management* Does Not Adequately Address An Employer's Burden When A Person On Disability Applies For Work Pursuant To Social Security Regulations

Cleveland v. Policy Management does not adequately address an employer's burden when a person on disability applies for work pursuant to social security regulations. In *Cleveland v. Policy Management Systems*, 526 U.S. 795 (1999), the Plaintiff suffered a stroke after being employed for about one year. *Id.* at 798. During a three-month period of convalescence, while still employed, she applied for SSDI. *Id.*

Upon her return to work, she sought accommodation for resulting physical and mental limitations and was terminated approximately three months later. *Id.* at 799. During the period of her return to work, her SSDI application was denied, but after various administrative appeals, it was ultimately granted. *Id.* This Court analyzed the seeming contradictions between her representations to the Social Security Administration and to her employer and held that "an ADA plaintiff cannot simply ignore the apparent contradiction that arises out

of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation." *Id.* at 806. Applying that holding, this Court found that her representations were not inconsistent.

While the Court's analysis in *Cleveland* may provide guidance where an employee seeks accommodation from her current employer during a period between application for SSDI and requests for accommodation, it does nothing to assist in analyzing the situation raised in this case, where Mr. Martini, who was unemployed and receiving SSDI for several years, sought to test whether he was capable of reentering the workforce.

Mr. Martini worked for Boeing for twelve years before becoming disabled. After leaving employment with Boeing and receiving disability benefits for more than five years, he attempted to reenter the workforce at Boeing on a trial basis. He was rejected by Boeing out of hand because he was on disability. Dr. Miller,[2] his treating psychologist, stated in an affidavit submitted to the court that Mr. Martini would have benefited from employment during the time period of his Boeing job application (with accommodation) and would probably have succeeded at work. App., *infra*, 61a, ¶ 13. Yet Boeing never consulted Mr. Martini or his doctor and never sought to determine whether Mr. Martini could perform the essential functions of the available jobs.

Plaintiff respectfully suggests that both employers and employees need guidance from this Court as to the

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[2] Dr. Miller is incorrectly identified in the Ninth Circuit opinion as Dr. Martin. App., *infra*, 5a.

interaction between the ADA and the trial work period envisioned in SSA regulations. Such guidance is necessary to harmonize their common goals of putting persons with disabilities back into the workforce with the Court's earlier opinion in *Cleveland*, which was construed by the trial court and the Ninth Circuit as supporting a complete bar to employment for persons wishing to leave disability.

C. The Court Of Appeals In Affirming Summary Judgment Misapplied *Cleveland* By Wrongly Focusing On Irrelevant Representations Made After The Discriminatory Failure To Hire And Failed To Address The Trial Work Period Issue

1. The Court Of Appeals Misapplied *Cleveland*

When Mr. Martini initially applied for SSDI benefits in 1991, he made statements in his application reflecting his belief that he could continue to work with accommodation. After receiving disability for more than five years, Mr. Martini sought to reenter the workforce and applied for a position with Boeing doing work similar to the work he had done prior to receiving disability.

Citing *Cleveland*, the court of appeals dismissed the relevance of Mr. Martini's 1991 representations that he could work with accommodation and stated that, "[t]he value of this explanation would be considerably bolstered by evidence that Martini was actually employed with the stated accommodations sometime between 1991 and 1996, and the absence of such employment suggests that the statements are not completely credible." App., *infra*, 2a.

The court of appeals also dismissed as irrelevant the testimony of the doctors who examined Mr. Martini between 1990 and 1996, App., *infra*, 3a, as well as the detailed affidavit of Dr. Miller which contained his opinion that Mr. Martini would have succeeded at employment with Boeing in February 1996. App., *infra*, 60a, ¶ 6; 61a, ¶ 13.

The most important evidence of Mr. Martini's representation as to his ability to work at the time of his job application to Boeing, which was completely ignored by the court of appeals, was the evidence of the job application itself, which strongly asserted both a desire to work and the qualifications to work at the particular jobs. Whereas the plaintiffs in *Cleveland* and its predecessor line of cases were already employed and making representations in the hope of obtaining SSDI benefits, thus necessitating this Court's inquiry in *Cleveland* into prior inconsistent representations made in efforts to obtain those benefits; here, Mr. Martini was already receiving benefits, and was trying to return to work and leave the social security rolls. Thus, for such applicants, there is no need to examine whether their motives are pure. The fact of the job application is all that should be needed to trigger ADA protections. The court of appeals completely ignored this significant distinction.

The only evidence found to be relevant by the court of appeals was testimony by Mr. Martini six months *after* his application for employment with Boeing, wherein he stated he was totally disabled after his shoulder injury.[3]

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[3] It should be noted that Boeing does not contend that it relied upon the August 1996 testimony as a contemporaneous factor in its failure to consider Mr. Martini for employment.

The court found, "It is hard to imagine a stronger and more definitive representation of total disability than Martini's testimony [in August 1996] that he was totally disabled for a six year period which included the date of his Boeing application." App. at 4a. This approach cannot withstand scrutiny even if *Cleveland*, *Johnson*, and *Kennedy* were found to be applicable. In each of those cases, the focus was on representations made *before*, not *after*, the alleged discriminatory conduct. *See Cleveland*, 526 U.S. at 806 (plaintiff cannot simply ignore the apparent contradiction that arises out of the *earlier* SSDI total disability claim); *Johnson*, 141 F.3d at 1369 (a plaintiff's *prior* representations may be so strong and definitive that they will defeat a plaintiff's prima facie case on traditional summary judgment grounds); *Kennedy*, 90 F.3d at 1481 (deposition testimony flatly contradicts both her *prior* sworn statements and the medical evidence).

In *Cleveland*, this Court recognized that "the nature of an individual's disability may change over time, so that a statement about that disability at the time of an individual's application for SSDI benefits may not reflect an individual's capacities at the time of the relevant employment decision." *Cleveland*, 526 U.S. at 805. Thus, it is plausible, and indeed likely, that when Mr. Martini applied for work at Boeing in February 1996, he felt able to work despite his depression and sleep apnea (as confirmed by Dr. Miller), but when testifying six months later after being discriminated against in hiring by Boeing, he may have lost all hope of ever working or of ever having been able to work while on disability.

More importantly, there is nothing inconsistent in saying, "I want to try to work under the trial work period

guidelines of the Social Security Act," and at the same time saying, "I am totally disabled." The SSA expressly allows such "inconsistency" to encourage disability insurance recipients to attempt to return to the workplace without subjecting them to financial vulnerability through a premature suspension of their disabled status. 42 U.S.C. § 422(c). Again, the petition must be granted to directly address this important distinction between the facts in *Cleveland* and the facts here.

2. The Court Of Appeals Failed To Address The Trial Work Period Issue

Despite Mr. Martini's consistent efforts to raise the importance of the trial work period in this case to the trial court and the court of appeals, the Ninth Circuit decision totally ignored the need to address and harmonize the trial work period provisions of 42 U.S.C. § 422(c) with the obligations to accommodate qualified individuals with disabilities under the ADA. *See* 42 U.S.C. §§ 12111, 12112.

Mr. Martini suggests that in granting his petition, this Court will have the opportunity to provide needed guidance and consider whether the job application itself is enough to trigger an employer's duty to consider a disabled applicant for employment. If the Court finds this to be the law, then employers will be required to consider such disabled applicants for employment unless they are determined not to be qualified individuals after proper pre-employment inquiries into the ability of the applicant to perform job-related functions. *See* 42 U.S.C. § 12112(d)(2)(B).

II. The Issue Of Whether The Ninth Circuit Should Have Granted State Certification On The State Law Discrimination Issue Is An Important Issue Of Comity

The United States Supreme Court encourages certification of state law issues. *Lehman Bros. v. Schein*, 416 U.S. 386 (1974). Certification advances interests of comity and federalism and "the problem of authoritatively determining unresolved state law involved in federal litigation." *Ciay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 212 (1960). The federal court has discretion to grant or deny certification. *United Farm Bureau Mut. Ins. Co., v. Metropolitan Human Relations Comm.*, 24 F.3d 1008, 1015, n.10 (7th Cir. 1994). The issues proposed by Mr. Martini for certification are issues of first impression that involve a question that is likely to recur because of the common interplay between persons applying for disability benefits under the SSA and the recognized discrimination persons with disabilities face in their attempts to seek employment that the ADA and state anti-discrimination laws seek to remedy. *See Geib v. Amoco Oil Co.*, 29 F.3d 1050, 1060-61 (6th Cir. 1994).

Mr. Martini proposed the following questions for state certification:

> 1. Does receipt of social security disability benefits by a disabled applicant for employment permit an employer to presume that the applicant is unqualified for the position and discharge the employer from any further responsibility

under Washington's Law Against Discrimination (WASH. REV. CODE § 49.60)?[4]

2. Does receipt of social security disability benefits by a disabled applicant for employment in any way modify the responsibilities of the employer under Washington's Law Against Discrimination (WASH. REV. CODE § 49.60) once notice that the applicant is disabled has been communicated to the employer? If so, how?

The Washington Supreme Court precedent in disability discrimination cases has departed substantially from federal precedent pertaining to the ADA and Title VII. *See Pulcino v. Federal Express*, 141 Wash. 2d 629, 641 n.3, 9 P.3d 787, 794 n.3 (2000) (Washington law provides protection for temporary disabilities contrary to ADA); *Martini v. Boeing*, 137 Wash. 2d 357, 364, 971 P.2d 45, 49 (1999) (Washington law provides greater remedies than Title VII and ADA); *Dean v. Municipality of Metropolitan Seattle-Metro*, 104 Wash. 2d 627, 708 P.2d 393 (1985) (rejects *McDonnell Douglas*[5] elements for a prima facie case of employment discrimination in disability discrimination cases). Not only is certification appropriate to address these issues of first impression with likely recurrence, certification to the Washington State Supreme Court to consider this issue now will also support comity and permit resolution of the state law issues without this Court speculating as to the degree to which the State

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[4] RCW 49.60.180 makes it an unfair practice for an employer to "refuse to hire any person because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability . . . . "

[5] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Supreme Court will continue to depart from federal precedent. Certification will clarify this issue and eliminate the risk that the Ninth Circuit has improperly predicted the decision of the Washington State Supreme Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUC J.R. MARTINI, Plaintiff-Appellant, v. THE BOEING COMPANY, a Washington corporation, Defendant-Appellee.	NO. 98-35642 D.C. No. CV-97-00671-WLD MEMORANDUM* (Filed Sep. 21, 2000)

Appeal from the United States District Court
for the Western District of Washington
William L. Dwyer, District Judge, Presiding

Argued and Submitted July 17, 2000
Seattle, Washington

Before: REAVLEY,** HALL and O'SCANNLAIN, Circuit Judges.

Luc Martini appeals the summary judgment in favor of the Boeing Company on his various claims of employment discrimination. Martini fails to sufficiently explain the inconsistency between his assertions of total disability

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

and his discrimination claim to require submission to a jury, therefore we affirm.

Martini's testimony in August, 1996 is particularly troubling and we find no explanation in the record to resolve the obvious inconsistency between this testimony and the claim that six months earlier Boeing was under a duty to accommodate Martini. Martini testified under oath that he had not worked, and that he had been incapable of work, for the past six years due to being totally disabled. This testimony is unqualified and obviously conflicts with the claim of employment discrimination.

In 1991 Martini qualified his SSDI application with statements that he believed that he could be employed with various accommodations. Such an explanation might suffice for the requirements of *Cleveland v. Policy Management Systems Corp.*, 119 S. Ct. 1597 (1999) if the only inconsistency existed between Martini's statements in 1991 and a contemporaneous claim of failure to accommodate. The value of this explanation would be considerably bolstered by evidence that Martini was actually employed with the stated accommodations sometime between 1991 and 1996, and the absence of such employment suggests that the statements are not completely credible. Furthermore, the sufficiency of this explanation evaporates in light of the 1996 testimony that Martini had been totally disabled and unable to work for the entire six years after he resigned from Boeing. The qualifying statements made in 1991 do nothing to explain how, in February 1996, Martini can assert Boeing was obligated to accommodate him despite his assertions, both before and after, of total disability.

Martini also suggests that the testimony of medical experts creates a question of fact regarding whether he was capable of employment. Dr. Conway's testimony, which is not contained in the record, was based upon his treatment of Martini in 1990 and 1991, and therefore does nothing to resolve the inconsistencies with regard to Martini's testimony in 1996. Dr. Cohen and Dr. Chinn testified that they found no psychiatric impediments to Martini's ability to obtain employment, although Dr. Cohen testified that Martini's psychiatric condition would create significant problems maintaining employment if Martini obtained a job. Martini's claims of total disability include sleep apnea, obesity, heart disease, shoulder injury as well as major depression, therefore these medical opinions at best address a small fraction of Martini's claims of disability. In addition, they do not explain why, "assuming the truth of, or [Martini's] good faith belief in, the earlier statement, [Martini] could nonetheless 'perform the essential functions' of [his] job, with or without a 'reasonable accommodation.' " *Cleveland*, 119 S. Ct. at 1604.

Comparison with *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996) and *Johnson v. State of Oregon*, 141 F.3d 161 (9th Cir. 1998) further supports our conclusion that Martini fails to establish a jury question. We agree with the magistrate that the distinctions between Martini and the *Kennedy* plaintiff mitigate in favor of summary judgment because Martini actually received a total disability rating for SSDI, and testified that his total disability covered a period of six years, including the date of his application to Boeing. The plaintiff in *Johnson* did not

make unqualified statements of total disability, but consistently maintained in her disability applications that she was capable of working. Martini cannot reasonably contend that his case more closely resembles *Johnson* than *Kennedy*. We previously held that "a plaintiff's prior representations may be so strong and definitive that they will defeat a plaintiff's prima facie case on traditional summary judgment grounds." *Johnson*, 141 F.3d at 1369. It is hard to imagine a stronger and more definitive representation of total disability than Martini's testimony that he was totally disabled for a six year period which included the date of his Boeing application.

Martini's [sic] argues that under Washington state law, Boeing was under an affirmative duty to determine the extent of his disability and take positive steps to accommodate him. *See Goodman v. Boeing Co.*, 899 P.2d 1265, 1269 (Wash. 1995). Boeing was entitled to reasonably conclude that Martini was totally disabled because of Martini's repeated assertions of total disability. To require Boeing to engage in additional research on Martini's condition under such circumstances is nonsensical. Washington law also requires the plaintiff to make a prima facie case before shifting the burden to the employer to produce a nondiscriminatory reason. *Fell v. Spokane Transit Authority*, 911 P.2d 1319, 1327 (Wash. 1996). One of the prima facie elements for the plaintiff's case is that the plaintiff was qualified to fill the position. *Martini v. Boeing Co.*, 945 P.2d 248, 253 (Wash. App. 1997). Because we conclude that Martini fails to establish a jury question on his prima facie case, summary judgment is proper with regard to his state law discrimination claim.

Martini also contends that the district court should have granted an extension of time to permit Martini to obtain the testimony of his psychologist. Dr. Martin's [sic] affidavit reveals his opinion that gainful employment would be beneficial to Martini, but this opinion is not relevant to resolve Martini's testimony that he was totally disabled at the time he applied to Boeing.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Filed June 11, 1997

HON. JOHN L. WEINBERG, U.S. MAGISTRATE JUDGE

Deputy Clerk: Judith A. Nothern
Tape: A-327
Date: June 11, 1997

MINUTES of PRELIMINARY PRE-TRIAL CONFERENCE

In re: **LUC MARTINI v. THE BOEING COMPANY**	Case #: C97-671WD

Plaintiff's Attorney: (Pro Se)
Defense Attorney: Orna Edgar

Held in open court. Court calls case and describes this court's role in the pre-trial process. Mr. Martini reviews for the court what his role was as an employee at Boeing and summarizes the issues before the court in this case.

Court hears from Ms. Edgar as to her client's position.

Mr. Martini requests up to one year for completion of discovery. Ms. Edgar requests the deadline be set at the end of this year.

Court discusses discovery procedure and how to resolve any disputes that may arise. Counsel are directed to contact Judy Nothern at 206-553-7416 to schedule a conference with the Judge if parties are not able to resolve a dispute amongst themselves.

Court sets pre-trial schedule. Scheduling order to follow according to Local Rule 16, 16.1.

Court not designated for 39.1 mediation at this time. If parties at a later point agree that this would be a helpful tool in settling this case, they may request designation at that time.

Ms. Edgar requests that the Court set a deadline for Boeing to file a motion for summary judgment, and to have all discovery matters stayed pending the ruling of that motion, (with specific exceptions). Court sets **August 11, 1997** as deadline for Boeing to file a motion for summary judgment. Discovery to be stayed until this motion is ruled upon. If this causes hardship for Plaintiff, objections to be filed with the court.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUC J.R. MARTINI, Plaintiff, V. THE BOEING COMPANY, Defendant.	CASE NO. C97-671 WD ORDER RE PARTIAL STAY OF DISCOVERY (Filed July 17, 1997)

At the preliminary pretrial conference June 11, 1997, the court partially stayed discovery in this case, in light of the representation by defendant that it would file a motion for summary judgment within 60 days. It now appears that the parties would benefit from a written clarification of the court's stay of discovery.

It is therefore ORDERED:

(1) Defendant may conduct discovery limited to the issue of the existence and extent of plaintiff's disability at the time of, and after, his 1996 employment application, including plaintiff's representations and any determinations as to that disability. This may include a deposition of plaintiff. Discovery by defendant in all other respects is STAYED.

(2) *All discovery* by plaintiff is STAYED, pending ruling by the court upon the summary judgment motion. But if plaintiff demonstrates that, to defend the summary

judgment motion, he needs to do discovery on the issue described above, he may apply for leave to do so.

The Clerk shall direct copies of this order to plaintiff, to counsel for defendant, and to the Hon. William L. Dwyer.

DATED this 17 day of July, 1997.

/s/ John L. Weinberg
John L. Weinberg
United States Magistrate Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUC J.R. MARTINI, Plaintiff, V. THE BOEING COMPANY, Defendant.	CASE NO. C97-671 WD ORDER DENYING STAY, STRIKING FILINGS, AND SETTING ORAL ARGUMENT ON MOTIONS FOR SUMMARY JUDGMENT

Defendant has moved for summary judgment (docket no. 31, filed August 11, 1997). Plaintiff has moved for summary judgment on defendant's affirmative defenses (docket #44, filed September 4, 1997). This order does not address the merits of those motions, but does rule upon some related procedural motions.

PLAINTIFF'S MOTION FOR STAY

Plaintiff moves to stay, until June of 1998, defendant's motion for summary judgment. Invoking Fed. Rule Civ. Proc. 56(f), he asserts that he needs to engage in extensive discovery before he can respond to the motion.

Defendant's summary judgment motion deals primarily, if not exclusively, with one narrow issue: the existence and extent of plaintiff's disability at the time of, and after, his 1996 employment application at Boeing,

including plaintiff's representations and any determinations as to that disability. The court's "Order re Partial Stay of Discovery," docket no. 23, entered July 17, 1997, identified that issue, included the following provision: "*All discovery* by plaintiff is STAYED, pending ruling by the court upon the summary judgment motion. But if plaintiff demonstrates that, to defend the summary judgment motion, he needs to do discovery on the issue described above, he may apply for leave to do so."

Plaintiff's motion for stay, and accompanying discovery plan, propose discovery which bears little or no relation to that issue. To the extent he is specific as to the discovery he proposes to do, plaintiff indicates he wishes to secure evidence as to the qualifications of persons who were in fact hired by defendant, and as to defendant's procedures for compliance with the Americans with Disabilities Act. Such discovery is not reasonably directed to the issue raised by defendant's summary judgment motion.

Plaintiff's motion for stay of the summary judgment motion is therefore DENIED.

DEFENDANT'S MOTIONS TO STRIKE CERTAIN OF PLAINTIFF'S PLEADINGS

Defendant has filed two motions to strike plaintiff's improperly filed pleadings. These motions allege that plaintiff has filed untimely pleadings relating to defendant's motion for summary judgment, in violation of the local rules of this court.

Plaintiff has responded to the first motion. The second motion was filed October 17, 1997, and is noted for

November 14, 1997. Plaintiff has not yet specifically responded to this motion. But the issues as to this motion appear to be identical to those relating to the prior motion, to which plaintiff has fully responded. Furthermore, delaying a ruling on the second motion to strike until November 14, 1997, would unduly delay the hearing on the parties' motions for summary judgment. The court will therefore address the merits of both motions to strike.

A review of the relevant record indicates that plaintiff, in opposition to defendant's summary judgment motion, has filed a stream of documents, some of which purport to amend prior filings. Some of plaintiff's filings were in fact after the noting date of the summary judgment motion.

Defendant filed its summary judgment motion on August 11, 1997, and properly noted the motion for September 5. Under Local Rule CR 7(b)(2), plaintiff's response was due September 1. Because that was a holiday, the response was due September 2. Plaintiff did file various documents in response to the motion on September 2 (docket nos. 38, 39 and 40). Those documents are not challenged by defendant.

Defendant's reply documents (docket nos. 48, 49 and 50) were filed September 4, in compliance with the local rule. But plaintiff filed amended versions of his prior filings (docket nos. 46 and 47) on September 4, which is not permitted by the local rules. Because defendant has not challenged these filings, however, they will be considered by the court.

Plaintiff then filed two additional documents (docket nos. 51 and 52) on September 8, which was after the noting date of the motion and a week after plaintiff's responses were due. Those documents were titled, "Plaintiff's Response in Opposition to Boeing's Entry of Additional Evidence in Boeing's Motion for Summary Judgment," and "Supplemental Declaration of Luc Martini in Plaintiff's Answer to Boeing's Motion for Summary Judgment Entry of Additional Evidence." Plaintiff's protestations that he is a pro se litigant, and his other justifications for late filing, are not persuasive. Those documents are STRICKEN, and will not be considered by the court in connection with defendant's summary judgment motion.

Plaintiff continued to file documents responsive to the summary judgment motion. On September 15 he filed his "Amended (in Form and Conclusion) Plaintiff's Response in Opposition to Boeing's Entry of Additional Evidence in Boeing's Motion for Summary Judgment" (docket no. 55). On October 7, over a month after the noting date of defendant's motion, he filed "Response in Opposition to Boeing's Reply in Plaintiff's Motion for Summary Judgment" (docket no. 58). These documents are likewise STRICKEN, and will not be considered by the court in connection with defendant's summary judgment motion.

The local rules contemplate a sequenced, and orderly, submission of documents relating to a motion. The moving party submits its motion papers and sets a noting date; the responding party submits his papers on the Monday before the noting date; and the moving party has an opportunity to file a reply the day before the noting

date. The parties are not entitled to continue to submit papers to the court thereafter.

ORAL ARGUMENT ON SUMMARY JUDGMENT MOTIONS

Plaintiff's request for oral argument is GRANTED as to defendant's motion for summary judgment (docket #31) and as to plaintiff's motion for summary judgment on defendant's affirmative defenses (docket #44). The Clerk will contact the parties to arrange a date and time for the argument. No additional filings will be considered in connection with those motions. The parties will be limited to 20 minutes per side. They may present oral argument based upon the record before the court, but may not submit further evidence at that hearing.

The Clerk shall direct copies of this order to plaintiff, to counsel for defendant, and to the Hon. William L. Dwyer.

DATED this 27 day of October, 1997.

/s/ John L. Weinberg
John L. Weinberg
United States Magistrate Judge

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUC J.R. MARTINI, Plaintiff, V. THE BOEING COMPANY, Defendant.	CASE NO. C97-671 WD ORDER GRANTING LEAVE TO FILE AMENDED COMPLAINT

In response to defendant's motion for judgment on the pleadings, plaintiff lodged a document titled "(Draft) Amended Complaint and Jury Demand." This document is attached to plaintiff's "Answer to Defendant's Motion," docket #12.

The Amended Complaint responds, in part, to defendant's challenges to the original complaint. It eliminates certain claims previously made by plaintiff, and attempts to address some of the defendant's criticisms of plaintiff's pro se pleading of his causes of action.

Defendant urges the court not to accept the Amended Complaint, because it purports to state several causes of action which are subject to dismissal under Fed. Rule Civ. Proc. 12(c). If so, the court can dismiss any such claims.

The "(Draft) Amended Complaint" should be accepted for filing.

Defendant also challenges plaintiff's jury demand in the amended complaint, arguing that plaintiff is barred from demanding a jury by his prior failures to make a timely demand. Defendant's argument in this respect is well taken. Plaintiff failed to demand a jury trial when he filed his complaint in Superior Court; and failed to demand a jury within ten days after the case was removed to this court. Under Fed. Rule Civ. Proc. 81(c), he therefore waived his right to a jury trial. The filing of an amended complaint which does not raise a new issue, but merely changes the theory of the case, does not revive a jury trial right which has been waived by a failure to demand in connection with the original pleading. Wright and Miller, *Federal Practice and Procedure: Civil 2d*, §2320, at 154. The jury demand in plaintiff's Amended Complaint is therefore STRICKEN.

The Clerk is therefore directed: (1) to file and docket plaintiff's "(Draft) Amended Complaint) [sic]," which currently is appended to docket #12; (2) to disregard plaintiff's purported Jury Demand and to maintain this case on the docket as a court trial; and (3) to direct copies of this order to plaintiff, to counsel for defendant, and to the Hon. William L. Dwyer.

DATED this 27 day of October, 1997.

/s/ John L. Weinberg
John L. Weinberg
United States Magistrate Judge

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUC J.R. MARTINI, Plaintiff, V. THE BOEING COMPANY, Defendant.	CASE NO. C97-671 WD REPORT AND RECOMMENDATION ON MOTION FOR JUDGMENT ON PLEADINGS

Defendant has moved for judgment on the pleadings, under Fed. Rule Civ. Proc. 12(c). The motion was directed to plaintiff's original complaint, which was filed in Superior Court prior to the removal of the case to this court.

As part of his response to the motion, plaintiff lodged a "(Draft) Amended Complaint." That document appears as an attachment to docket #12. By separate order, the court has directed the Clerk to file and docket that document as an Amended Complaint. In drafting that document, plaintiff eliminated some of the causes of action challenged by defendant's motion, and provided additional factual allegations in support of others. This Report and Recommendation therefore addresses only the portions remaining in dispute. Claims presented in the original complaint, but deleted from the Amended Complaint, need not be addressed by the court.

In considering a motion for judgment on the pleadings, the allegations of the non-moving party (plaintiff) must be accepted as true, while the allegations of the moving party (defendant) which have been denied are assumed to be false. Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990).

1. **Vietnam Era Veterans Readjustment Assistance Act ("VRA"), 38 U.S.C. §4212.** Plaintiff acknowledges that this statute creates no private right of action. His arguments for retaining them as part of this case are unpersuasive. Defendant's motion should be GRANTED as to plaintiff's claims under this statute.

2. **§503 of the Rehabilitation Act, 29 U.S.C. §793.** Again, plaintiff acknowledges that this statute creates no private right of action, and his arguments for retaining them as part of this case are unpersuasive. Defendant's motion should be GRANTED as to plaintiff's claims under this statute.

3. **Title 41, C.F.R., Parts 60-250, 60-741 and 60-742.** Once again, plaintiff acknowledges that there is no private right of action under these provisions of the federal regulations. He contends, however, that his claims are subsumed within his claims under 38 U.S.C. §4212 and 29 U.S.C. §793. I have previously recommended that those claims be dismissed; and there is no basis for any claim by plaintiff under these sections of Title 41 of the Code of

Federal Regulations. Defendant's motion for judgment on the pleadings as to these claims should be granted.

4. **RCW ch. 49.44**. Plaintiff purports to assert various claims under RCW ch. 49.44. These statutes prescribe criminal penalties for various labor practices. Plaintiff has provided no authority indicating that these statutes entitle a worker to bring a civil action based upon their violation. Defendant's motion for judgment on the pleadings should be granted as to all of plaintiff's claims under this chapter.

5. **Title VII**. Plaintiff also asserts claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 et seq. Defendant's challenge to these claims is that plaintiff has not plead sufficient details to provide a full explanation of his claims. Given the fact that plaintiff is proceeding pro se, the court cannot measure his pleadings by the same standards as pleadings prepared by counsel. In any event, the court should conclude that his Amended Complaint provides defendant sufficient notice as to the nature and factual background of his claims. If necessary, defendant can obtain further information though [sic] discovery. Defendant's motion for judgment on the pleadings as to plaintiff's Title VII claim should be denied.

6. **ADA and WLAD**. Defendant acknowledges that plaintiff is entitled to pursue his claims under the Americans with Disabilities Act (42 U.S.C. §12101) and the Washington Law Against Discrimination ("WLAD," RCW 49.60.010). Defendant's motion should be denied as to these claims.

A proposed order accompanies this Report and Recommendation.

DATED this 27 day of October, 1997.

/s/ John L. Weinberg
John L. Weinberg
United States Magistrate Judge

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUC J.R. MARTINI, Plaintiff, v. THE BOEING COMPANY, Defendant.	CASE NO. C97-671WD ORDER ON MOTION FOR JUDGMENT ON PLEADINGS (Filed Dec. 3, 1997)

The Court has reviewed defendant's Motion for Judgment on the Pleadings, the parties filings relating to that motion, the Report and Recommendation on Motion for Judgment on Pleadings prepared by U.S. Magistrate Judge John L. Weinberg, and the balance of the record. It is therefore ORDERED:

(1) Defendant's motion is GRANTED as to plaintiff's claims under the Vietnam Era Veterans Readjustment Assistance Act ("VRA"), 38 U.S.C. §4212; under §503 of the Rehabilitation Act, 29 U.S.C. §793; Title 41, C.F.R., Parts 60-250, 60-741 and 60-742; and RCW ch. 49.44. As to all of the foregoing claims, the court [will /s/ WLD] will enter [a /s/ WLD] judgment on the pleadings for defendant, pursuant to Fed. Rule Civ. Proc. 12(c) [, when the case is completed. /s/ WLD]

(2) Defendant's motion is DENIED as to plaintiff's claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.; under the Americans with Disabilities Act (42 U.S.C. §12101); and under the Washington Law Against Discrimination ("WLAD," RCW 49.60.010).

(3) The Clerk shall direct copies of this order to plaintiff, to counsel for defendant, and to Judge Weinberg.

DATED this 28th day of Nov., 1997.

/s/ William L. Dwyer
William L. Dwyer
United States
District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUC J.R. MARTINI, Plaintiff, v. THE BOEING COMPANY, Defendant.	CASE NO. C97-671WD REPORT AND RECOMMENDATION ON MOTIONS FOR SUMMARY JUDGMENT

The Court granted Judgment on the Pleadings in favor of defendant The Boeing Company ("Boeing") on a number of plaintiff's claims by order of November 28, 1997. Boeing now moves for summary judgment on all of plaintiff's remaining claims. Plaintiff moves for summary judgment on various of Boeing's affirmative defenses. Plaintiff was originally proceeding *pro se*, but now has counsel. The parties have submitted extensive materials relating to these motions, and have presented oral argument.

For the reasons set forth below, the court should conclude that this case is controlled by the decision of the U.S. Court of Appeals for the Ninth Circuit in *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996). The court should therefore grant Boeing's motion, should deny

plaintiff's motion, and enter final judgment in favor of Boeing on all claims.

Plaintiff, an engineer, was employed by Boeing until 1990. He suffered from major depressive disorder and a number of physical impairments, which were present at least as early as the summer of 1990. Boeing alleges plaintiff resigned from his position; plaintiff claims he was forced to resign because he was constructively discharged. This court need not resolve that issue, as it has been the subject of extensive litigation in state court, resulting in an award of damages to plaintiff.

In three separate applications for benefits, plaintiff has asserted since 1991 that he is totally disabled. He has received, and continues to receive, disability benefits from two of those sources.

This case relates to a new application for employment, submitted by plaintiff to Boeing in 1996. Boeing did not hire plaintiff – in fact, Boeing apparently did not respond to the application. Remaining in this case are plaintiff's claims that, in failing to hire him in 1996, Boeing incurred liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et. seq.; under the Americans with Disabilities Act, 42 U.S.C. §12101 et seq.; and under the Washington Law Against Discrimination, RCW 49.60.010.

In this case, as in *Kennedy*, plaintiff's claims are foreclosed because there is no genuine issue of fact as to whether plaintiff was totally disabled when he applied to Boeing for employment in February of 1996.

The first of plaintiff's three disability applications was for Social Security disability insurance benefits. To be entitled to receive such benefits, plaintiff must establish that he is unable to engage in any substantial gainful employment. Plaintiff so alleged when he applied for these benefits in December of 1990. His application was granted in 1991, and he has received monthly benefits ever since.

A person receiving Social Security disability benefits is required by law to notify the Social Security Administration when and if he recovers sufficiently that he is able to work. In his application for benefits, plaintiff acknowledged this obligation, and promised that he would do so. In fact, if a recipient is not longer disabled, it is a federal criminal offense to fail to disclose that fact, with fraudulent intent. 42 U.S.C. §408. There is no evidence that plaintiff has ever given such notification to the Social Security Administration. It is apparent that he has never done so, as he continues to receive benefits.

Plaintiff also applied in 1991 for disability benefits under a private policy for the benefit of Boeing employees. He was granted these benefits, and continues to receive them through the present. To be entitled to these benefits, plaintiff was obliged to demonstrate that he was unable to work at any reasonable occupation. While this bears some significance in this case, it is not as cogent as plaintiff's continued receipt of Social Security disability benefits, because there is no evidence that plaintiff had a continuing duty to inform the private disability insurer of any improvement in his condition.

Plaintiff's third relevant application for benefits was from the Washington State Department of Labor and Industries. In a hearing relating to this application, plaintiff testified in August of 1996 that he had not been able to work since 1990 (Day Decl., docket 34, ex. 2, at 41). This is significant because plaintiff's testimony was six months after his 1996 application for employment with Boeing.

Kennedy was a claim under the Americans with Disabilities Act. Plaintiff claimed that her employer had terminated her, without accommodating her disability. The court noted that plaintiff had the burden of proving that she was a disabled person who, with or without accommodation, could perform the job she held or desired. 42 U.S.C. §12111(8), and 29 C.F.R. §1630.2(m). Plaintiff had applied for Social Security disability insurance benefits. In her application, plaintiff had stated that she was disabled from all work. In support of the application, she had also offered the deposition testimony of her doctor to the same effect. The Court of Appeals affirmed the determination of the District Court that there was therefore no issue of material fact as to whether plaintiff could work, with or without accommodation by her employer.

The facts in *Kennedy* are distinguishable from the facts in this case in at least three respects. But each distinction only strengthens the conclusion that Boeing is entitled to summary judgment. The first distinction is that, in *Kennedy,* the Social Security Administration *denied* the plaintiff's application for disability benefits. The court held that, despite this fact, plaintiff's representations as to her inability to work were determinative in her ADA action. In Mr. Martini's case, the Social Security

Administration *granted* his application, and continues to pay benefits.

The second distinction is that the plaintiff in *Kennedy* presented her own deposition testimony that she was not totally disabled. The Court of Appeals rejected that testimony as uncorroborated and self-serving, and flatly contradictory of her prior sworn statements and the medical evidence. The court therefore held that, despite plaintiff's deposition testimony, there was no genuine issue of material fact as to plaintiff's inability to work. In the present case, there is no such testimony by Mr. Martini. This is not surprising, in light of his obligation to notify Social Security if he becomes able to work, and the criminal penalties for continued receipt of disability insurance benefits under false pretenses.

The third distinction between the cases is plaintiff's testimony in his Labor & Industries hearing that he had not been able to work from 1990 at least through August of 1996 – a period which encompassed his application for employment at Boeing. There was no similar evidence in *Kennedy*.

In sum, this case presents even more compelling reasons for granting summary judgment for defendant.

Plaintiff places principal reliance upon *Swanks v. WMATA*, 116 F.3d 582 (D.C. Cir. 1997). The court in that case held that an employee's receipt of Social Security disability insurance benefits did not necessarily preclude him from claiming that his employer discharged him in violation [sic] the ADA. The court's reasoning was that the determination of "disability" for purposes of Social Security benefits did not take into the account the need

for, or possibility, of accommodating an employee's disability.

To the extent *Swanks*, a D.C. Circuit case, is inconsistent with *Kennedy*, the latter case must control here, as it is binding Ninth Circuit authority. But it is worthy of note that the court in *Swanks* perceived no inconsistency between the cases. In fact, the *Swanks* court cited *Kennedy* as authority for its conclusion, characterizing the *Kennedy* decision as, " . . . relying on entire evidentiary record, not just appellant's statements on state and Social Security benefit forms, to conclude that appellant failed to raise genuine issue of material fact." *Swanks*, 116 F.3d at 586.

In Mr. Martini's case, as in *Kennedy*, the entire record raises no genuine issue of material fact as to whether he could work, even with accommodation from his employer.

Boeing also argues that plaintiff is foreclosed by judicial estoppel from asserting that he was able to work in February of 1996, and is therefore not entitled to pursue his claims arising from Boeing's failure to hire him. Plaintiff responds, in part, that it is Boeing which is judicially estopped, as it has challenged plaintiff's assertions of disability in the state Labor & Industries proceeding. Because the case can be resolved on the basis of the absence of a genuine issue of material fact, as in *Kennedy*, this court need not address the parties' respective arguments of judicial estoppel.

CONCLUSION

The record establishes that, when plaintiff applied in February of 1996 for re-employment with Boeing, plaintiff was totally disabled. This precludes, as a matter of law, the possibility of any recovery by plaintiff on any of his remaining theories in this case: disability discrimination under state or federal statutes; or retaliation or any other discrimination under Title VII of the Civil Rights Act of 1984. The court should therefore GRANT Boeing's motion for summary judgment on all remaining claims; DENY plaintiff's motion for summary judgment on Boeing's affirmative defenses; and enter judgment in favor of Boeing on all claims.

A proposed form of order accompanies this Report and Recommendation.

DATED this 21 day of April, 1998.

/s/ John L. Weinberg
John L. Weinberg
United States
Magistrate Judge

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUC J.R. MARTINI, Plaintiff, v. THE BOEING COMPANY, Defendant.	CASE NO. C97-671WD SUPPLEMENT TO REPORT AND RECOMMENDATION OF APRIL 21, 1998

The Court and the parties should be aware of a very recent decision of the U.S. Court of Appeals for the Ninth Circuit in *Johnson v. State of Oregon*, ___ F.3d ___, (No. 96-36191), decided April 20, 1998. A copy of the decision is attached to this Supplement.

The court found that pursuit or receipt of disability payments does not per se judicially estop an employee from asserting a claim under the Americans with Disabilities Act. However, the Court also recognized the holding in *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996), that a plaintiff's prior representations may be so strong and definitive that they will defeat the plaintiff's prima facie case on traditional summary judgment grounds.

The Report and Recommendation filed April 21, 1998, in this case recommends that the court grant summary judgment for defendant, applying the rule in *Kennedy*. The Report & Recommendation expressly does not

reach the parties' contentions on the issue of judicial estoppel (Report & Recommendation, at 5). For that reason, it is submitted that the recent decision in *Johnson* is consistent with the Report & Recommendation.

DATED this 4 day of May, 1998.

/s/ John L. Weinberg
John L. Weinberg
United States Magistrate
Judge

APPENDIX J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUC J.R. MARTINI, Plaintiff, v. THE BOEING COMPANY, Defendant.	CASE NO. C97-671WD ORDER ON MOTIONS FOR SUMMARY JUDGMENT (Filed Jun. 3, 1998)

The Court, having reviewed the Motions for Summary Judgment filed by the parties in the case, the responses thereto, the Report and Recommendation of the Hon. John L. Weinberg, United States Magistrate Judge, and the remaining record, does hereby find and Order:

(1) The Court adopts the Report and Recommendation;

(2) The Defendant's Motion for Summary Judgment (docket 31) is GRANTED and Plaintiff's Motion for Summary Judgment (docket 44) is DENIED; and

(3) The Clerk is directed to send copies of this Order to counsel for both parties, and to the Hon. John L. Weinberg.

DATED this 2nd day of June, 1998.

/s/ William L. Dwyer
William L. Dwyer
United States District Judge

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUC J. R. MARTINI, Plaintiff-Appellant, v. THE BOEING COMPANY, a Washington corporation, Defendant-Appellee.	No. 98-35642 DC# CV-97-671-WLD Western Washington (Seattle) ORDER (Filed Jul. 26, 1999)

Before: HAWKINS and GRABER, Circuit Judges

Appellant's motion to consider additional authority and to certify question to state court is referred to the panel assigned to hear the merits of this appeal.

This case is ready for calendaring.

APPENDIX L

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUC J.R. MARTINI, Plaintiff-Appellant, v. THE BOEING COMPANY, a Washington corporation, Defendant-Appellee.	No. 98-35642 D.C. No. CV-97-00671-WLD ORDER (Filed Oct. 31, 2000)

Before: REAVLEY,[1] HALL and O'SCANNLAIN, Circuit Judges.

Appellant's motion to correct word count is GRANTED. Appellant's motion to file appendix with brief is DENIED.

The panel has voted unanimously to deny the appellant's petition for rehearing. Judges Hall and O'Scannlain have voted to deny the appellant's petition for rehearing en banc. Judge Reavley recommended that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a

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[1] The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX M

42 U.S.C. § 422

(a) Referral for rehabilitation services. It is declared to be the policy of the Congress that disabled individuals applying for a determination of disability, and disabled individuals who are entitled to child's insurance benefits, widow's insurance benefits, or widower's insurance benefits, shall be promptly referred to the State agency or agencies administering or supervising the administration of the State plan approved under title I of the Rehabilitation Act of 1973 [29 USCS §§ 720 et seq.] for necessary vocational rehabilitation services, to the end that the maximum number of such individuals may be rehabilitated into productive activity.

. . . .

(c) "Period of trial work" defined. (1) The term "period of trial work," with respect to an individual entitled to benefits under section 223, 202(d), 202(e) or 202(f) [42 USCS § 423, 402(d), (e), or (f)], means a period of months beginning and ending as provided in paragraphs (3) and (4). (2) For purposes of sections 216(i) and 223 [42 USCS §§ 416(i), 423], any services rendered by an individual during a period of trial work shall be deemed not to have been rendered by such individual in determining whether his disability has ceased in a month during such period. For purposes of this subsection the term "services" means activity (whether legal or illegal) which is performed for remuneration or gain or is determined by the Commissioner of Social Security to be of a type normally performed for remuneration or gain. (3) A

period of trial work for any individual shall begin with the month in which he becomes entitled to disability insurance benefits, or, in the case of an individual entitled to benefits under section 202(d) [42 USCS § 402(d)] who has attained the age of eighteen, with the month in which he becomes entitled to such benefits or the month in which he attains the age of eighteen, whichever is later, or, in the case of an individual entitled to widow's or widower's insurance benefits under section 202(e) or (f) [42 USCS § 402(e), or (f)] who became entitled to such benefits prior to attaining age 60, with the month in which such individual becomes so entitled. Notwithstanding the preceding sentence, no period of trial work may begin for any individual prior to the beginning of the month following the month in which this paragraph is enacted [enacted Sept. 1960]; and no such period may begin for an individual in a period of disability of such individual in which he had a previous period of trial work. (4) A period of trial work for any individual shall end with the close of whichever of the following months is the earlier: (A) the ninth month, in any period of 60 consecutive months, in which the individual renders services (whether or not such nine months are consecutive); or (B) the month in which his disability (as defined in section 223(d) [42 USCS § 423(d)]) ceases (as determined after application of paragraph (2) of this subsection).

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42 U.S.C. § 423

(e) Engaging in substantial gainful activity. (1) No benefit shall be payable under subsection (d)(1)(B)(ii),

(d)(6)(A)(ii), (d)(6)(B), (e)(1)(B)(ii), or (f)(1)(B)(ii) of section 202 [42 USCS § 402(d)(1)(B)(ii), (d)(6)(A)(ii), (d)(6)(B), (e)(1)(B)(ii), or (f)(1)(B)(ii)] or under subsection (a)(1) of this section to an individual for any month, after the third month, in which he engages in substantial gainful activity during the 36-month period following the end of his trial work period determined by application of section 222(c)(4)(A) [42 USCS § 422(c)(4)(A)]. (2) No benefit shall be payable under section 202 [42 USCS § 402] on the basis of the wages and self-employment income of an individual entitled to a benefit under subsection (a)(1) of this section for any month for which the benefit of such individual under subsection (a)(1) is not payable under paragraph (1).

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20 CFR § 404.1592 (1998)

The trial work period.

(a) Definition of the trial work period. The trial work period is a period during which you may test your ability to work and still be considered disabled. It begins and ends as described in paragraph (e) of this section. During this period, you may perform services (see paragraph (b) of this section) in as many as 9 months, but these months do not have to be consecutive. We will not consider those services as showing that your disability has ended until you have performed services in at least 9 months. However, after the trial work period has ended we will consider the work you did during the trial work

period in determining whether your disability ended at any time after the trial work period.

(b) What we mean by services. When used in this section, services means any activity (whether legal or illegal), even though it is not substantial gainful activity, which is done in employment or self-employment for pay or profit, or is the kind normally done for pay or profit. We generally do not consider work done without remuneration to be services if it is done merely as therapy or training or if it is work usually done in a daily routine around the house or in self-care. We will not consider work you have done as a volunteer in the federal programs described in section 404.1574(d) in determining whether you have performed services in the trial work period.

(1) If you are an employee. We will consider your work as an employee to be services if:

(i) Before January 1, 2002, your earnings in a month were more than the amount(s) indicated in Table 1 for the year(s) in which you worked.

(ii) Beginning January 1, 2002, your earnings in a month are more than an amount determined for each calendar year to be the larger of:

(A) Such amount for the previous year, or

(B) An amount adjusted for national wage growth, calculated by multiplying $ 530 by the ratio of the national average wage index for the year 2 calendar years before the year for which the amount is being calculated to the national average wage index for 1999. We will then round the resulting amount to the next higher multiple of

$ 10 where such amount is a multiple of $ 5 but not of $ 10 and to the nearest multiple of $ 10 in any other case.

(2) If you are self-employed. We will consider your activities as a self-employed person to be services if:

(i) Before January 1, 2002, your net earnings in a month were more than the amount(s) indicated in Table 2 of this section for the year(s) in which you worked, or the hours you worked in the business in a month are more than the number of hours per month indicated in Table 2 for the years in which you worked.

(ii) Beginning January 1, 2002, you work more than 80 hours a month in the business, or your net earnings in a month are more than an amount determined for each calendar year to be the larger of:

(A) Such amount for the previous year, or

(B) An amount adjusted for national wage growth, calculated by multiplying $ 530 by the ratio of the national average wage index for the year 2 calendar years before the year for which the amount is being calculated to the national average wage index for 1999. We will then round the resulting amount to the next higher multiple of $ 10 where such amount is a multiple of $ 5 but not of $ 10 and to the nearest multiple of $ 10 in any other case.

TABLE 1. – FOR EMPLOYEES

For months	You earn more than
In calendar years before 1979	$ 50
In calendar years 1979-1989	$ 75
In calendar years 1990-2000	$200
In calendar year 2001	$530

TABLE 2. – FOR THE SELF-EMPLOYED

For months	Your net earnings are	Or you work in the business more than
In calendar years before 1979	$50	15 hours
In calendar years 1979-1989	$75	15 hours.
In calendar years 1990-2000	$200	40 hours
In calendar year 2001	$530	80 hours

(c) Limitations on the number of trial work periods. You may have only one trial work period during a period of entitlement to cash benefits.

(d) Who is and is not entitled to a trial work period. (1) You are generally entitled to a trial work period if you are entitled to disability insurance benefits, child's benefits based on disability, or widow's or widower's or surviving divorced spouse's benefits based on disability.

(2) You are not entitled to a trial work period –

(i) If you are entitled to a period of disability but not to disability insurance benefits, and you are not entitled to any other type of disability benefit under title II of the Social Security Act (i.e., child's benefits based on disability, or widow's or widower's benefits or surviving divorced spouse's benefits based on disability);

(ii) If you perform work demonstrating the ability to engage in substantial gainful activity during any required waiting period for benefits;

(iii) If you perform work demonstrating the ability to engage in substantial gainful activity within 12 months of the onset of the impairment(s) that prevented you from performing substantial gainful activity and before the date of any notice of determination or decision finding that you are disabled; or

(iv) For any month prior to the month of your application for disability benefits (see paragraph (e) of this section).

(e) When the trial work period begins and ends. The trial work period begins with the month in which you become entitled to disability insurance benefits, to child's benefits based on disability or to widow's, widower's, or surviving divorced spouse's benefits based on disability. It cannot begin before the month in which you file your application for benefits, and for widows, widowers, and surviving divorced spouses, it cannot begin before December 1, 1980. It ends with the close of whichever of the following calendar months is the earliest:

(1) The 9th month (whether or not the months have been consecutive) in which you have performed services if that 9th month is prior to January 1992;

(2) The 9th month (whether or not the months have been consecutive and whether or not the previous 8 months of services were prior to January 1992) in which you have performed services withir a period of 60 consecutive months if that 9th month is after December 1991; or

(3) The month in which new evidence, other than evidence relating to any work you did during the trial

work period, shows that you are not disabled, even though you have not worked a full 9 months. We may find that your disability has ended at any time during the trial work period if the medical or other evidence shows that you are no longer disabled. See § 404.1594 for information on how we decide whether your disability continues or ends.

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§ 12101. Congressional findings and purposes

(a) Findings. The Congress finds that –

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is

justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose. It is the purpose of this Act –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

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§ 12102. Definitions

As used in this Act:

(1) Auxiliary aids and services. The term "auxiliary aids and services" includes –

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability. The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State. The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

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§ 12111. Definitions

As used in this title:

(1) Commission. The term "Commission" means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(2) Covered entity. The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee. The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer.

(A) In general. The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions. The term "employer" does not include – (i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(6) Illegal use of drugs. (A) In general. The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled

Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law. (B) Drugs. The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 USCS § 812].

(7) Person, etc. The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(8) Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation. The term "reasonable accommodation" may include –

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate

adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship.

(A) In general. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include – (i) the nature and cost of the accommodation needed under this Act; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

§ 12112. Discrimination

(a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. As used in subsection (a), the term "discriminate" includes –

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration – (A) that have the effect of discrimination on the basis of disability; or (B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or

speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries.

(1) In general. It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation. (A) Presumption. If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer. (B) Exception. This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer. (C) Determination. For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on – (i) the interrelation of operations; (ii) the common management; (iii) the centralized control of labor relations; and (iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries.

(1) In general. The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) Preemployment.

(A) Prohibited examination or inquiry. Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry. A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination. A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if –

(A) all entering employees are subjected to such an examination regardless of disability; (B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that – (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and (iii) government officials investigating compliance with this Act shall be provided relevant information on request; and (C) the results of such examination are used only in accordance with this title.

(4) Examination and inquiry. (A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity. (B) Acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions. (C) Requirement. Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

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42 U.S.C. § 1320b-19 note, P.L. No. 106-170, § 2, 113 Stat. 1860, 1862-63 (1999)

Sec. 2. FINDINGS AND PURPOSES.

(a) Findings. – The Congress makes the following findings:

(1) It is the policy of the United States to provide assistance to individuals with disabilities to lead productive work lives.

(2) Health care is important to all Americans.

(3) Health care is particularly important to individuals with disabilities and special health care needs who

often cannot afford the insurance available to them through the private market, are uninsurable by the plans available in the private sector, and are at great risk of incurring very high and economically devastating health care costs.

(4) Americans with significant disabilities often are unable to obtain health care insurance that provides coverage of the services and supports that enable them to live independently and enter or rejoin the workforce. Personal assistance services (such as attendant services, personal assistance with transportation to and from work, reader services, job coaches, and related assistance) remove many of the barriers between significant disability and work. Coverage for such services, as well as for prescription drugs, durable medical equipment, and basic health care are powerful and proven tools for individuals with significant disabilities to obtain and retain employment.

(5) For individuals with disabilities, the fear of losing health care and related services is one of the greatest barriers keeping the individuals from maximizing their employment, earning potential, and independence.

(6) Social Security Disability Insurance and Supplemental Security Income beneficiaries risk losing medicare or medicaid coverage that is linked to their cash benefits, a risk that is an equal, or greater, work disincentive than the loss of cash benefits associated with working.

(7) Individuals with disabilities have greater opportunities for employment than ever before, aided by important public policy initiatives such as the Americans with Disabilities Act of 1990 (*42 U.S.C. 12101* et seq.),

advancements in public understanding of disability, and innovations in assistive technology, medical treatment, and rehabilitation.

(8) Despite such historic opportunities and the desire of millions of disability recipients to work and support themselves, fewer than one-half of one percent of Social Security Disability Insurance and Supplemental Security Income beneficiaries leave the disability rolls and return to work.

(9) In addition to the fear of loss of health care coverage, beneficiaries cite financial disincentives to work and earn income and lack of adequate employment training and placement services as barriers to employment.

(10) Eliminating such barriers to work by creating financial incentives to work and by providing individuals with disabilities real choice in obtaining the services and technology they need to find, enter, and maintain employment can greatly improve their short and long-term financial independence and personal well-being.

(11) In addition to the enormous advantages such changes promise for individuals with disabilities, redesigning government programs to help individuals with disabilities return to work may result in significant savings and extend the life of the Social Security Disability Insurance Trust Fund.

(12) If only an additional one-half of one percent of the current Social Security Disability Insurance and Supplemental Security Income recipients were to cease receiving benefits as a result of employment, the savings

to the Social Security Trust Funds and to the Treasury in cash assistance would total $3,500,000,000 over the work-life of such individuals, far exceeding the cost of providing incentives and services needed to assist them in entering work and achieving financial independence to the best of their abilities.

(b) Purposes. – The purposes of this Act are as follows:

(1) To provide health care and employment preparation and placement services to individuals with disabilities that will enable those individuals to reduce their dependency on cash benefit programs.

(2) To encourage States to adopt the option of allowing individuals with disabilities to purchase medicaid coverage that is necessary to enable such individuals to maintain employment.

(3) To provide individuals with disabilities the option of maintaining medicare coverage while working.

(4) To establish a return to work ticket program that will allow individuals with disabilities to seek the services necessary to obtain and retain employment and reduce their dependency on cash benefit programs.

APPENDIX N

U. S. MAGISTRATE JUDGE JOHN L. WEINBERG

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUC J. R. MARTINI, Plaintiff, vs. THE BOEING COMPANY, Defendant.	Case No. C97-671WD DECLARATION OF ROBERT MILLER, PH.D.

I, Robert Miller, Ph.D., make the following statement based upon personal knowledge.

1. I Know [sic] Luc Martini. I have been Mr. Martini's treating psychologist since 1991.

2. I have seen Mr. Martini in my capacity as his psychologist at least (on average) on a monthly basis since 1991.

3. Mr. Martini has suffered from major depression in typical up and down course since he has been under my care.

4. It is my opinion, based upon medical history from prior to 1991, and his course since he has been under my care, that there are many significant factors in the causation and aggravation of his major depressive illness, but the most significant factor has been his interactions with the Boeing Company.

5. It is my opinion that Mr. Martini, at times when his illness was improving, would have substantially benefited from being employed on a provisional basis.

6. It is my opinion that Mr. Martini would reasonably have been able to overcome his illness sufficiently to return to gainful employment.

7. It is my opinion that provisional employment would be on a trial basis and under medical supervision.

8. It is my opinion that such provisional employment should incorporate the following medical considerations:

   - Trial employment should not be of a trivial nature; Mr. Martini has an active mind and psychological need to expand his learning – challenge his mind;
   - Trial employment should substantially involve employment related to his career history and fall within the scope of his existing expertise; trial employment is to be therapeutic, and not add additional stressors that would likely have pejorative medical or psychological consequences;
   - Trial employment should accommodate his considerable medical problems, notably: sleep apnea syndrome; cardiovascular problems; morbid obesity problems;
   - Trial employment should not require significant life-changes such as relocation to another city or state that would require he leave his home; Mr. Martini remains at risk from significant stressors which significant life stressors engender;
   - Trial employment should not add significant stressors such as real or perceived financial risk

leading to possible destitution; loss of medical care; increased potential of sudden death from further aggravation of his serious medical conditions and other factors which would tend to significantly increase anxiety;

9. It is my opinion, based on Mr. Martini's medical and work history that the only likely place where he could obtain employment which would be least likely to be pejorative to his medical and psychological well-being would be at his former employer, the Boeing Company.

10. Many times over the years, I offered Mr. Martini professional advise that he would benefit from provisional employment, discussed the medical and psychological considerations thereto, and urged him to seek such employment opportunities.

11. It is my opinion that Mr. Martini's major depressive illness continues to be aggravated by the burdens of litigation in which Mr. Martini has been involved against the Boeing Company in an attempt to redress past and present discrimination against him in his efforts to obtain employment and accommodation.

12. I have since 1991, submitted at least yearly reports to AETNA Disability Insurance Co., at their request, on Mr. Martini's medical status, as it existed at the time of such reports, including medical recommendations that Mr. Martini would benefit from provisional employment.

13. It is my opinion that in February 1996, Mr. Martini was in an improved medical status following his legal victory over Boeing, and at that time, he would have been most likely able to benefit from and succeed in provisional employment, and subsequently return to full gainful employment.

14. I have given prior testimony before the King County Superior Court in Mr. Martini's disability discrimination case against Boeing, and in his Board of Industrial Insurance Appeals in his Labor and Industries claim of aggravation of preexisting medical conditions from industrial injury, substantially offering the same opinions as here.

I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

Dated this 6th day of May, 1998, in Tacoma, WA.

/s/ Robert Miller
ROBERT MILLER

APPENDIX O

PERKINS COIE
[Addresses Omitted In Printing]

RUSSELL L. PERISHO
(206) 583-8494

CONFIDENTIAL--SUBMITTED IN RESPONSE TO A REQUEST FOR INFORMATION FROM THE EEOC

September 16, 1996

BY HAND DELIVERY

John C. Montoya
Deputy Director
Equal Employment Opportunity Commission
909 First Avenue, Suite 400
Seattle, WA 98104-1061

Re: Luc J. Martini and The Boeing Company, EEOC Charge No. 380960837

Dear Mr. Montoya:

This letter responds to the charge of discrimination filed by Luc Martini against The Boeing Company. The Notice of Charge of Discrimination was received by Boeing on June 6, 1996, and it contains a charge of discrimination filed by Martini on May 26, 1996.

Martini's charge alleges discrimination based on disability and unlawful retaliation in connection with a letter Martini wrote to Boeing dated February 28, 1996. The charge has no merit, and Boeing absolutely denies that it acted unlawfully with respect to Martini.

Martini's charge must be rejected for the following reasons:

1. Martini is not qualified for any position of employment. He currently collects social security disability benefits, which were awarded in 1991 after Martini certified he was totally disabled. He also currently receives monthly long-term disability insurance payments for being totally disabled. Indeed, Martini testified under oath at a workers' compensation hearing in July 1996 that he has been unable to work since 1990. Because of this, Martini cannot establish a prima facie case of discrimination or retaliation. He is not "qualified" to hold employment.

2. Martini engaged in misconduct which disqualified him from employment at Boeing. Specifically, if Martini states that he is *not* now totally disabled, he has misrepresented the facts to government agencies and an insurance company. He did misrepresent facts in 1991 in his application for disability benefits submitted under oath to the Social Security Administration. Also, he misrepresented his experience at Boeing in his February 28, 1996 letter to Boeing. This misconduct excuses Boeing from any duty to consider Martini for employment.

3. Finally, Martini has not suffered any unlawful discrimination or retaliation. He cannot establish that he has the necessary qualifications to fill open jobs in the areas identified in his February 28, 1996 letter.

Boeing's detailed response is set out below.

Factual Background

* * *

In a letter dated February 28, 1996, Luc Martini asked that Boeing consider his resume in connection with four skill areas at Boeing. Martini was not hired.

Martini's Sworn Statements That He Cannot Work Bar Consideration of the Charge of Discrimination

Martini applied for social security disability benefits in December 1990, certifying that he was unable to work and totally disabled. Benefits were awarded in 1991, and the determination was made that Martini was totally disabled beginning July 16, 1990. As far as Boeing knows, Martini continues to receive social security disability benefits every month. In doing so, Martini is certifying that he continues to be totally disabled.

Martini also applied for and received long-term disability benefits pursuant to his representation that he was totally disabled and unable to work. He continues to collect these monthly benefits.

Just two months ago, in July 1996, Martini testified under oath in a workers' compensation proceeding that he has not worked since July 1990, and that he has been unable to work since that date.

As a threshold matter, Boeing has no legal obligation to consider Martini's application for employment in these circumstances.

If Martini is totally disabled and unable to work, he cannot be "qualified" for an employment position at Boeing. To establish a prima facie case of either discrimination or retaliation, Martini needs to show he was qualified to fill employment positions for which he was not hired. This he cannot do.

The Ninth Circuit Court of Appeals just issued a decision which clearly requires dismissal of Martini's charge. In *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (1996) (attached), a sales representative with chronic fatigue syndrome was fired by her employer the day after she applied for state disability benefits. She later also applied for social security disability benefit, certifying that she was completely disabled for work-related purposes.

On those facts, the Ninth Circuit upheld the dismissal of the employee's ADA claim of discrimination, stating:

> Because she was totally disabled, there was no genuine issue that she could have performed her job with the proposed or any other, accommodation.

This is more than just not being qualified for employment. Numerous courts have enforced the fundamental proposition that individuals cannot certify to one agency that they are unable to work and then certify to a different agency that they are qualified to work. Courts have been unwilling to countenance this kind of overt manipulation of facts in order to obtain benefits or compensation.

In *McNemar v. The Disney Store*, 91 F.3d 610 (3d Cir. 1996) (attached), the court applied the doctrine of "judicial estoppel" to protect the integrity of the judicial process where a plaintiff alleged job discrimination at the same time he made sworn statements to government agencies that he was totally disabled and unable to work. In *McNemar*, both ADA and state law discrimination claims were dismissed when the individual certified to the Social Security Administration that he was totally disabled.

In *Reigel v. Kaiser Health Plan of N.C.*, 859 F. Supp. 963 (E.D.N.C. 1994) (attached), a court granted summary judgment against an employee who had obtained disability benefits by submitting numerous statements to different governmental entities that she was unable to work. The court held that, given these statements, no rational finder of fact could conclude that the plaintiff was a "qualified individual with a disability." The Court stated that " . . . plaintiff cannot speak out of both sides of her mouth with equal vigor and credibility before this court. Plaintiff now seeks money damages from [her employer] on her assertion that she was physically willing and able to work during the same period that she was regularly collecting disability payments on her assertion that she was unable to work." The Court rejected the notion that plaintiff could create a cause of action when she was certifying that she was totally disabled.

In *Miller v. U.S. BanCorp*, 1996 U.S. Dist. LEXIS 7068 (D. Or. 1996) (attached), a former employee received benefits under an employer's long-term disability plan as well as social security benefits. Both the long-term disability plan and the statute required as a prerequisite to

obtaining benefits a finding of inability to work in any gainful employment. The Court found that plaintiff's statements on these applications, as well as her receipt of benefits with knowledge of the standards for eligibility, barred her from pursuing a claim under either the ADA or Oregon's law against discrimination.

The following courts have relied on representations that an individual was totally and permanently disabled to *reject* discrimination claims: *Harden v. Delta Air Lines, Inc.*, 4 A.D. Cas. (BNA) (S.D. Ga. 1995); *Pegues v. Emerson Electric Co.*, 913 F. Supp. 976 (N.D. Miss. 1996); *Nguyen v. IBP, Inc.*, 905 F. Supp. 1471 (D. Kan. 1995); *Nguyen v. IBP, Inc.*, 905 F. Supp. 1471 (D. Kan. 1995) [sic]; *Nguyen v. IBP, Inc.*, 905 F. Supp. 1471 (D. Kan. 1995) [sic]; *Smith v. Midland Brake Inc.*, 911 F. Supp. 1351 (D. Kan. 1995); *Miller v. U.S. Bancorp*, 1996 WL 277768 (D. Or. 1996); *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768 (8th Cir. 1987); *Parker v. Metropolitan Life Insurance Co.*, 875 F. Supp. 1321, 1323 (W.D. Tenn. 1995); *Reiff v. Interim Personnel, Inc.* [sic] 906 F. Supp. 1280 (D. Minn. 1995); *Garcia-Paz v. Swift Textiles*, 873 F. Supp. 547, 554 (D. Kan. 1995); *Cline v. Western Horseman, Inc.*, 5 A.D. Cas. (BNA) 714 (D. Colo. 1990); *Hatfield v. Quantum Chemical Corp.*, 920 F. Supp. 108 (S.D. Tex. 1996), *Ricks v. Xerox Corp.*, 1995 U.S. Dist. LEXIS 12955 (D. Kan. 1995); *Lewis v. Zilog, Inc.*, 4 A.D. Cas. (BNA) 1787 (N.D. Ga. 1995); *Farror v. Bell-Atlantic–PA.*, 5 A.D. Cas. (BNA) 793 (W.D. Pa. 1996); *Bennett v. United Parcel Service*, 5 A.D. Cas. (BNA) 260 (S.D. Tex. 1995).

Martini's Misconduct Disqualified Him From Employment With Boeing

* * *

Martini Cannot Establish That He Is Qualified to Fill Open Positions Related to the Skill Specialty Areas Identified in His February 28, 1996 Letter

Martini expressed interest in four "positions" in his February 28, 1996 letter: (1) Manager, NATO Retrofit; (2) Research/Program Support-Radar/Signal Processing/Sensor Fusion; (3) AWACS Instructional Systems/Support; and (4) F-22 Instructional Systems/Support.

At the outset, it should be noted that what were identified by Martini as "positions" were actually "skill specialty areas." An advertisement appearing in *Aviation Week* and *Space Technology* in January 29, 1996 referenced opportunities in skill specialty areas including instructional course designers in the F-22 and AWACS program.

As stated earlier, Martini cannot establish that he was qualified to be considered for any employment at Boeing because he states he is unable to work. Even setting this aside, Martini cannot establish that he was qualified to fill open jobs related to the areas identified in his February 28, 1996 letter. He does not have the skills and experience to make him a viable candidate.

* * *

In sum, the charge must be dismissed. One, Martini's sworn statements that he is totally disabled bar his charge of discrimination. Two, Martini has engaged in misconduct which disqualifies him from employment at Boeing. Three, in any event, Martini cannot establish that

he is qualified to fill open jobs in the areas identified in his February 28, 1996 letter.

Very truly yours,

/s/ Russell L. Perisho
Russell L. Perisho

RLP:kmd
Attachments

APPENDIX P

PERKINS COIE

[Addresses Omitted In Printing]

RUSSELL L. PERISHO
(206) 583-8494

CONFIDENTIAL—SUBMITTED IN RESPONSE TO A REQUEST FOR INFORMATION FROM THE EEOC

October 11, 1996

John C. Montoya
Deputy Director
Equal Employment Opportunity Commission
909 First Avenue, Suite 400
Seattle, WA 98104-1061

Re: Luc J. Martini and The Boeing Company, EEOC Charge No. 380960837

Dear Mr. Montoya:

On September 16, 1996, Boeing responded to the charge of discrimination filed by Luc Martini in the above-captioned matter. In the response, Boeing urged the EEOC to dismiss the charge on the grounds, for one thing, that Martini had sworn under oath that he is unable to work and is totally disabled. Numerous court cases have held that employees cannot claim in discrimination cases that they should have been hired for a job when, at the same time, they are certifying to other government agencies that they are unable to work.

Following our submission, we received the transcript of Mr. Martini's testimony on August 20, 1996 in a hearing on his workers compensation claim against Boeing.

At pages 40-41 of the transcript (attached), the following exchange occurs:

Q: Did you ever return to work for Boeing after-well, what was your last date of employment with Boeing?

A: The last day of work was the 16th. My last day of employment was August 21st, or something like that, of 1990.

Q: Of 1990?

A: Right.

Q: Did you ever return to work for them after that date?

A: No, I did not.

Q: Have you ever worked at all after that date?

A: No, I have not.

Q: *Have you been able to work at all after that date?*

A: *No, I have not.*

Q: Is that inability due at least in part to the psychiatric condition?

A: Yes it is.

Q: Did the shoulder injury have an effect on the psychiatric condition or did it manifest it?

A: Yes, it was the causative thing that pushed me over the edge from being employed successfully *to being totally disabled.*

Transcript (attached), pp. 40-41 (emphasis added).

Please contact the undersigned if you have any further questions.

Very truly yours,

/s/ Russell L. Perisho
Russell L. Perisho

RLP:kmd
Attachment